

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Respondent;

Case No. 2001-2667-FH

vs.

KENNETH FOSTER PETTY,

Petitioner.

OPINION AND ORDER
OF THE COURT

Petitioner filed a writ of habeas corpus under MCR 3.303.

Petitioner is currently incarcerated in the Parnall Correctional Facility in Jackson, Michigan. On August 17, 2005, petitioner was found guilty by jury for one count of sub-delivering controlled substance less than 50 grams, in violation of MCL 333.7401(2)(a)(iv), which provides that the felony is punishable by imprisonment for not more than 20 years or a fine of not more than \$25,000, or both. Petitioner also pleaded guilty to probation violation. This Court sentenced petitioner to a minimum of 2 years and a maximum of 20 years, with 249 days jail credit. In addition, the Court terminated the lifetime probation provision imposed on petitioner on April 16, 2002.

Although MCR 3.303(A)(2) provides that the action must be brought in the county in which the prisoner is detained, there are exceptions for bringing the action in another county. Jackson, Michigan, is not in Macomb County, but this Court will make an exception and respond to petitioner's petition.



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Petitioner now challenges his sentence under MCL 769.34(4)(a), stating he is being restrained against his liberty as a result of a radical jurisdictional defect, and requests relief in the form of a remand for resentencing in accord with the applicable guideline range.

Applicable Law

MCL 769.34(4)(a) provides that if the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. Further, an intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

Our Supreme Court has defined a substantial and compelling reason for departure from the guidelines as requiring "an 'objective and verifiable' reason that 'keenly' or 'irresistibly' grabs our attention'; is 'of 'considerable worth' in deciding the length of a sentence'; and 'exists only in exceptional cases.'" *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003).

A probation violation may constitute a substantial and compelling reason to depart from the guidelines: When a probationer violates his probation, it is a violation of public trust and can, in exceptional cases, amount to a substantial and compelling reason to depart from the guidelines range. *People v Hendrick*, 261 Mich App 673, 676; 683 NW2d 218, lv gtd 471 Mich 914 (2004). Therefore, when resentencing a defendant after revoking his probation, the trial court may consider the seriousness and severity of

the circumstances surrounding the probation violation in determining whether there is a substantial and compelling reason to depart from the guidelines. *Id.*

Discussion

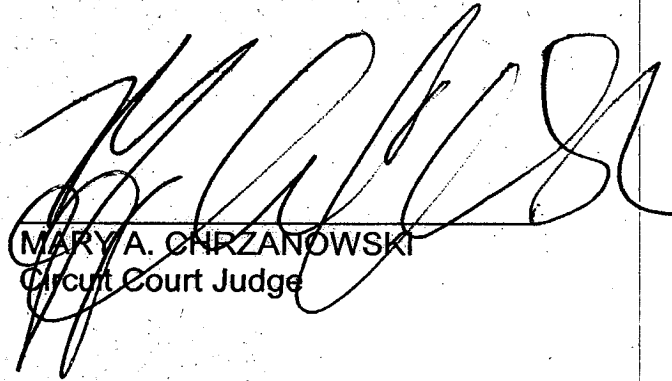
A review of the transcript record of the August 17, 2005 sentencing hearing clearly indicates why the Court deviated from the recommended sentencing guideline range of 0 to 17 months. Following the imposition of lifetime probation in 2002, petitioner tested positive for cocaine use on 8-4-2004, 8-24-2004 and 9-22-2004. Additionally, petitioner failed to report to his probation officer as mandated on several occasions. At the hearing, the Court articulated that it had given [defendant] "every single break possible" and he still violated his probation. The Court additionally stated, "You're here on a 20-year felony. You were given the graces of lifetime probation. You violated your probation now four times."

The Court determined that it found compelling and substantial reasons to deviate from the minimum sentence of 17 months, as the petitioner was placed on lifetime probation in 2002, but continued to violate by using illegal drugs; he had been given rehabilitative options that had all been exhausted, and had been given every chance to follow the rules and deliberately failed. In essence, the Court found that petitioner did not understand the seriousness of his actions. In sum, the Court stated, "For those reasons, I am deviating from the mandatory minimum 17 months and placing you in the Michigan Department of Corrections for a period of 2 to 20 years with credit for 249 days. Your lifetime probation is terminated."

The Court continues to be of the opinion that the sentencing deviation was proper under the circumstances presented, therefore, petitioner's request for writ of

habeas corpus and remand for resentencing is DENIED. Pursuant to MCR 2.602(A)(3),
this case remains CLOSED.

IT IS SO ORDERED.



MARY A. CHRZANOWSKI
Circuit Court Judge

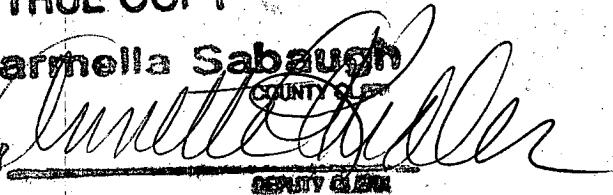
Dated: August 21, 2006

cc: APA Yasmine Isshak
Kenneth Foster Petty, #382694, Pamall Correctional Facility, 1790 E. Pamall, Jackson, MI
49201-7139

A TRUE COPY

Carmella Sabaugh

BY



DEPUTY CLERK